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No. 99-1545

In The

Supreme Court of the United States

PAUL GONZALES, SR. AND ELIZABETH GONZALES, Individually And As Personal Representatives Of The Estate Of Edward G. Gonzales, Deceased,

Petitioners,

v.

THE CITY OF KERRVILLE, TEXAS AND DONALD H. BUNCH, Individually And In His Official Capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a municipality be liable for damages under 42 U.S.C. § 1983 based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm?

PARTIES TO THE PROCEEDING

Respondents:

The City of Kerrville, Texas and Donald H. Bunch by and through their attorneys of Record, Charles S. Frigerio and Hector X. Saenz, Law Offices of Charles S. Frigerio, 111 Soledad, Suite 840, San Antonio, Texas 78205.

Petitioners:

Paul Gonzales, Sr., Elizabeth Gonzales and The Estate of Edward G. Gonzales, by and through their attorneys of record, Les Mendelsohn and Ricky J. Poole, Mendelsohn & Associates, P.C., 110 Broadway, Suite 500, San Antonio, Texas 78205.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

OPINIONS 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. Terror in Kerrville 3

2. Vigilant Wait Was One of Restraint 3

3. Officer Bunch Acts in Self-Defense 4

4. Verdict Form 5

5. Trial Court Denies Motion to Alter Judgment ... 6

6. Fifth Circuit Affirms 7

REASONS FOR DENYING WRIT OF CERTIORARI 7

1. Fifth Circuit 7

2. Other Circuits 8

A. Eighth Circuit 8

B. Ninth Circuit 9

C. Tenth Circuit 10

D. Eleventh Circuit 11

E. Third Circuit 11

TABLE OF CONTENTS – Continued

Page

CITY OF LOS ANGELES AS A PARADIGM..... 12

CONCLUSION 14

APPENDIX:

1. Judgment of the District Court..... 1a
2. Jury Questions Submitted to the Jury 2a
3. Order on Plaintiff's Motion to Alter Judgment or, Alternatively, Motion for New Trial 5a

TABLE OF AUTHORITIES

Page

CASES:

Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997) 13

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) 9

City of Los Angeles v. Heller, 475 U.S. 796 (1986) (*per curiam*) ..... *passim*

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 12

Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) (*en banc*) 11, 12

Hinton v. City of Elwood, Kan., 997 F.2d 774 (10th Cir. 1993) 10

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 9

Myers v. Oklahoma County Board of City Comm., 151 F.3d 1313 (10th Cir. 1998) 10

Quintanilla v. City of Downey, 84 F.3d 353 (9th Cir. 1996) 9

Rooney v. Watson, 101 F.3d 1378 (11th Cir. 1996) 11

Rush v. Smith, 45 F.3d 1197 (8th Cir. 1995) 8

Saenz v. Heldenfels Brothers, Inc., 183 F.3d 389 (5th Cir. 1999) 8

Simmons v. Philadelphia, 947 F.2d 1042 (3rd Cir. 1991), *cert. denied*, 503 U.S. 985 (1992) 11

Wilson v. Meeks, 98 F.3d 1247 (10th Cir. 1996) 10

STATUTES:

42 U.S.C. § 1983 ..... *passim*

OPINIONS

The judgment of the Honorable H.F. Garcia, United States District Judge, Western District of Texas, San Antonio Division entered on August 25, 1998, is non-published. App. 1a. The opinion of the United States Court of Appeals for the Fifth Circuit entered on December 20, 1999, is unreported. The Court of Appeals order denying rehearing en banc entered on January 24, 2000 is not published.

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. Compelling reasons are indicated if the decision leading to the petition contributes to a conflict of authority between the Courts of Appeal or State Courts of last resort; reflects a departure from the usual course of proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioners have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. The legal principle of the case subjudice was enunciated by this Court in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), therefore, there is no conflict of authority which should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV.

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . . ."

42 U.S.C. § 1983

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity or other proper proceeding . . . ."

STATEMENT OF THE CASE

The case at bar presents the following question upon which this Court has previously enunciated the rule of law:

> "Can a municipality be liable for damages under 42 U.S.C. § 1983 based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."

In *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*) this Court answered this question in the negative. The case at bar is squarely on point with *City of Los*

Angeles v. Heller. Respondents assert that there is no compelling reason for this Court to readdress this issue.

1. Terror in Kerrville.

On October 29, 1994, Petitioners' Decedent, for reasons still unknown, became embroiled in a violent rage. Petitioners' Decedent, Edward Gonzales, assaulted his cousin by thrashing him with a butt of a semiautomatic rifle. When Edward Gonzales' father attempted to intervene in the assault, Edward Gonzales pointed the semiautomatic rifle at his father and threatened to kill him. Following these transgressions Edward Gonzales positioned himself on top of the Upper Guadalupe River Authority ("UGRA") dam. From this vantage point, Edward Gonzales began his reign of terror on the City of Kerrville by randomly firing his semiautomatic rifle into the community from all directions.

Law enforcement officers arrived at the scene, including officers from the Kerrville Police Department, the Kerr County Sheriff's Department and officers from the Texas Department of Public Safety.

2. Vigilant Wait Was One of Restraint.

Law enforcement officers positioned themselves on the north and south banks of the UGRA dam. All attempts of negotiating with Edward Gonzales failed and were met by hostile gunfire. Decedent's own brother, Paul Gonzales, Jr., an animal control officer with the City of Kerrville at the time in question, pled with his brother to surrender over the public address system of one of the

Kerrville Police Department Patrol vehicles. In response to his brother's plea to surrender, Edward Gonzales shot at his own brother. Edward Gonzales' reign of terror continued for approximately forty-five minutes during which time a bullet entered an apartment complex window inches away from a baby's crib. Other shots rang out as they entered a retirement community narrowly missing the elderly residents. During the fusilade perpetrated by Gonzales, over forty (40) rounds were fired. Kerrville Police Officers Duran, Sanchez and Murphy testified at trial that during the attack that they were placed in imminent fear of death by the lone gunman.

3. Officer Bunch Acts in Self-Defense.

As the lone gunman proceeded to aggressively cross on top of the dam in a northerly direction toward Officer Bunch and other officers on the north side of the dam, the lone gunman raised his rifle directly at Officer Bunch. Officer Bunch described the rapidly evolving events as follows:

> A. I said, drop your rifle. Drop your rifle now . . . at that point, he raised the rifle up towards me . . . he pointed the rifle up there at me like this (indicating), and I thought, my God he's fixing to shoot at me . . . ."
>
> Q. And where was that barrel pointed?
>
> A. It was pointed right at me.
>
> Q. And what did you think at that moment?
>
> A. I was in fear for my life. He was pointing the rifle at me, there was no question in my mind he was going to shoot at me. My

> training took over, which is to defend my life . . . I aimed at his chest and pulled the trigger.

Only when Officer Bunch was placed in imminent fear of death or serious bodily injury did he fire a single round fatally wounding Plaintiffs' Decedent. Officer Bunch's shot was the only shot fired by any law enforcement officer at the scene. Officer Bunch's action in utilizing deadly force was reasonable and justified from a totality of the circumstances, as a matter of law.

4. Verdict Form.

The Honorable H.F. Garcia submitted special interrogatory No. 1 to the jury as follows:

Special Interrogatory No. 1:

Do you find from a preponderance of the evidence that either the City of Kerrville or Donald H. Bunch deprived Edward G. Gonzales of his constitutional rights as defined in the Court's instructions?

ANSWER "YES" OR "NO" with respect to each Defendant.

ANSWER: City of Kerrville *"Yes"*

Sgt. Donald Bunch *"No"*

If you have answered "Yes" to Special Interrogatory No. 1 with respect to Donald H. Bunch, then answer Special Interrogatory No. 2. **If you answered "No" to Special Interrogatory No. 1 with respect to Donald H. Bunch, then do not answer Special Interrogatory. No. 3.** (Emphasis added) The Court's entire verdict form is attached as App. 2a.

Petitioners' counsel did not object to this Special Interrogatory submitted which predicates a yes answer to Donald H. Bunch before any damages question could be answered. Petitioners' counsel was fully aware of this explanatory instruction and its requirement for an affirmative answer as to Officer Donald Bunch before any damages could be assessed. Petitioners' counsel did not object to the explanatory instruction of Special Interrogatory No. 1 either on the record or at the charge conference since Petitioners' counsel was fully aware of the legal principle enunciated in *City of Los Angeles v. Heller*.

5. Trial Court Denies Motion to Alter Judgment.

The Honorable H.F. Garcia entered a take nothing judgment based on the jury's verdict on August 25, 1998. App. 1a. Petitioners filed a motion to alter judgment or alternatively a motion for new trial. On September 24, 1998, the Honorable H.F. Garcia denied Plaintiff's motion to alter judgment. See, App. 5a. The Trial Court reasoned that under *City of Los Angeles v. Heller*, no liability could attach to the municipality since the officer had inflicted no constitutional harm. The trial court went on to hold that notwithstanding this legal principle that the Petitioners failed to establish a custom or policy of the City of Kerrville which was a proximate result of the alleged constitutional deprivation at issue. No evidence was presented that the City of Kerrville had actual knowledge of a pattern or series of allegations of excessive force on the part of its officers, and in particular Officer Bunch. Therefore, the trial court held that the Plaintiffs' *Monell* claim failed, as a matter of law. See, App. 5a.

6. Fifth Circuit Affirms.

The United States Court of Appeals for the Fifth Circuit in a per curiam opinion affirmed the trial court's take nothing judgment in favor of the City of Kerrville and Officer Bunch. The Fifth Circuit reasoned that only excessive force was alleged as a violation of Petitioner's constitutional rights and the only individual alleged to have used excessive force was Officer Bunch. Thus, since Officer Bunch was found not to have violated the constitutional rights of the Petitioner the claim against the City fails, as a matter of law. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*).

REASONS FOR DENYING WRIT OF CERTIORARI

1. Fifth Circuit.

The Fifth Circuit opinion in the case at bar is squarely on point with *City of Los Angeles v. Heller*. Despite Petitioners' cantations to the contrary, this Court has specifically addressed this very issue presented by this case in *City of Los Angeles v. Heller*. No conflict or confusion exists in the Circuit Courts of Appeals regarding the *City of Los Angeles v. Heller* decision, except in the mind of the Petitioners.

Respondents assert that there is no compelling reason for this Court to review by Writ of Certiorari the Fifth Circuit's decision in Gonzales which is consistent with this Court's opinion in *City of Los Angeles v. Heller*.

Petitioners assert that the Fifth Circuit has never addressed the issue of *City of Los Angeles v. Heller*, 475

U.S. 796 (1986) (*per curiam*), in the context of municipal liability. Petitioners' claim is misplaced. In *Saenz v. Heldenfels Brothers, Inc.*, 183 F.3d 389 (5th Cir. 1999), the Fifth Circuit addressed this very issue. In *Saenz*, the Court affirmed a summary judgment of Deputy Gonzalez and Brooks County concerning a claim that Brooks County had a custom or policy permitting Deputy Gonzalez to interfere with junior officers' attempts to apprehend drunk drivers. The Court, citing *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), held as follows:

> "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized [his actions] is quite beside the point."

The Court held that a municipality cannot be liable when the individual officer has been exonerated of the underlying constitutional deprivation.

2. Other Circuits.

Petitioners mistakenly claim that there is confusion in the Circuit Courts of Appeals regarding *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*).

A. Eighth Circuit.

In *Rush v. Smith*, 45 F.3d 1197 (8th Cir. 1995), the Eighth Circuit affirmed a trial court's denial of a plaintiff's motion for a new trial in a Section 1983 case involving excessive force. The Court specifically citing *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), held:

> "When a police officer is found to have inflicted no constitutional injury in a Section 1983 suit, it follows that this finding is dispositive as to the liability of the supervising police commission and the municipality as well."

The Eighth Circuit has no confusion over the *City of City of Los Angeles v. Heller.*

B. Ninth Circuit.

In *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), the Ninth Circuit affirmed a judgment entered after a jury verdict against a plaintiff in a Section 1983 excessive force case. Ironically, the *Quintanilla* case also dealt with the use of a police dog as the instrumentality of the excessive force. Similar to the much-relied-on case of the petitioners in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). In *Quintanilla*, the plaintiff proffered the same misguided assertion as the Petitioners herein in citing *Chew v. Gates* to circumvent the *Heller* decision. However, the Ninth Circuit in *Quintanilla*, in a well-reasoned decision affirmed judgment for the city and held:

> "Plaintiff cites *Chew v. Gates*, 27 F.3d 1332 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1097 (1995) and *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), for the proposition that a police department may be liable under Section 1983 for damages caused by unconstitutional policies notwithstanding the exoneration of the individual officer whose actions were the immediate cause of the constitutional injury. While this may be true if the plaintiff established that he suffered a

> constitutional injury and the officer's exoneration resulted from qualified immunity . . . this proposition has no applicability here. Plaintiff failed to established that he suffered a constitutional injury."

The Ninth Circuit has no confusion over the *City of Los Angeles v. Heller*.

C. Tenth Circuit.

In *Wilson v. Meeks*, 98 F.3d 1247 (10th Cir. 1996), the Tenth Circuit addressed a similar fact scenario as the case at bar. In *Wilson*, the plaintiffs made the same misplaced assertion that municipal liability could exist absent a finding of individual liability for a constitutional deprivation. The Court held:

> "This assertion is blatantly inaccurate . . . the district court correctly concluded that no municipal liability could be found in this case because there was no constitutional violation committed by any of the individual defendants. A municipality may not be held liable where there was no constitutional violation by any of its officers. *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) (citing *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*)).
>
> This same reasoning was followed in *Myers v. Oklahoma County Board of Cty. Comm.*, 151 F.3d 1313 (10th Cir. 1998).

The Tenth Circuit has no confusion over the *City of Los Angeles v. Heller*.

D. Eleventh Circuit.

In *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), the Eleventh Circuit affirmed the District Court's granting of summary judgment to Volusia County after a finding that the deputy sheriff in question had not deprived the plaintiff of a constitutional right. The Court held:

> "Since we have determined that Deputy Watson's conduct did not cause the Rooneys to suffer a constitutional deprivation, we need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curiam*)."

The Eleventh Circuit has no confusion over the *City of Los Angeles v. Heller.*

E. Third Circuit.

Petitioner's reliance on *Simmons v. Philadelphia*, 947 F.2d 1042 (3rd Cir. 1991), *cert. denied*, 503 U.S. 985 (1992) and *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (*en banc*) for the proposition of municipal liability in the case subjudice is misplaced. The *Simmons* case dealt with the failure to provide adequate medical care in a jail setting under the prism of the Eighth Amendment. The *Simmons* case dealt with the combined acts and/or omissions of several employees acting under a governmental policy of treating suicidal inmates. The *Simmons* case is inapposite to the case at bar. Petitioners further seek harbor in *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994) but their reliance is for naught. In *Fagan*, the Third Circuit reviewed a high speed pursuit case under Section

1983 as it related to the City of Vineland. The *Fagan* case bears no precedental value in light of this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

The Third Circuit has no confusion with regard to *City of Los Angeles v. Heller*.

CITY OF LOS ANGELES AS A PARADIGM

Petitioners' plaintiff wail cannot overcome the fact that *City of Los Angeles v. Heller* is squarely on point with the case at bar. In *Heller*, plaintiff brought suit under Section 1983 alleging excessive force against the City of Los Angeles and Officer Bushey. In a bifurcated trial, the jury returned a verdict for Defendant Officer Bushey that he had not violated the constitutional rights of Heller. The Court, after having received the verdict, dismissed the case as to the City of Los Angeles. The Ninth Circuit reversed and this Court granted certiorari and reversed the Ninth Court of Appeals' decision. This Court held that a jury finding that a police officer inflicted no constitutional harm precluded Section 1983 damages against the municipality based on the actions of the officer. This Court held that no Supreme Court case has ever authorized the award of damages against a municipal corporation based on the actions of one of its officers when the jury has concluded that the officer inflicted no constitutional harm.

In the case at bar, the Petitioners brought suit under Section 1983 against the City of Kerrville and Officer Bunch alleging excessive force. Petitioners claimed that Officer Bunch's single shot fatally wounding Petitioners'

Decedent, constituted excessive force. The jury returned a verdict that Officer Bunch did not violate the constitutional rights of Petitioners' Decedent. The jury, following the instructions of the Court, did not answer the qualified immunity question since no constitutional violation was found on the part of Officer Bunch. Since Officer Bunch inflicted no constitutional harm, Section 1983 damages are precluded against the City of Kerrville based on Officer Bunch's actions. *City of Los Angeles v. Heller* is controlling authority.

Furthermore, as the District Court held, Petitioners failed to establish municipal liability under *Monell*. Petitioners failed to establish a custom and policy of the City of Kerrville that was the direct proximate cause of any constitutional violation, as a matter of law. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 (1997).

CONCLUSION

The jury finding that Officer Bunch inflicted no constitutional harm precludes Section 1983 damages against the City of Kerrville based upon Officer Bunch's actions, as a matter of law. *City of Los Angeles v. Heller* is controlling authority and there is no compelling reason to grant Petitioners' writ for certiorari. Respondents request that the Petition be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Aug. 25, 1998]

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil No. SA-6-CA-998 HG

PAUL GONZALES, SR. and ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,

Plaintiffs,

v.

THE CITY OF KERRVILLE, TEXAS; and DONALD H. BUNCH, IN HIS OFFICIAL CAPACITY,

Defendants.

JUDGMENT

On this day, the Court considered the answers to Special Interrogatory Number 1 provided by the jury upon conclusion of deliberations. The jury having unanimously decided that defendant Donald H. Bunch did not violate the rights of Edward G. Gonzales, as alleged in the complaint, the Court hereby renders a take nothing judgment against the plaintiffs in favor of the defendants. All issues having been resolved, the Clerk is ordered to close this case.

Signed on this the 25th day of August, 1998.

/s/ H. F. Garcia
H. F. GARCIA
United States District Judge

APPENDIX B

[Filed Aug. 24, 1998]

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil No. SA-96-CA-998 HG

PAUL GONZALES, SR. and ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,

Plaintiffs,

v.

THE CITY OF KERRVILLE, TEXAS; and DONALD H. BUNCH, IN HIS OFFICIAL CAPACITY,

Defendants.

SPECIAL INTERROGATORIES

Special Interrogatory No. 1

1. Do you find from a preponderance of the evidence that either the City of Kerrville or Donald H. Bunch deprived Edward Gonzales of his constitutional rights as defined in the Court's instructions?

Answer "Yes" or "No" with respect to each defendant.

Answer: The City of Kerrville YES

Donald H. Bunch NO

If you have answered "Yes" to Special Interrogatory No. 1 with respect to Donald H. Bunch, then answer Special Interrogatory No. 2. If you answered "No" to

Special Interrogatory No. 1 with respect to Donald H. Bunch, then do not answer Special Interrogatory No. 3.

Special Interrogatory No. 2

2. With respect to the conduct of Donald H. Bunch on the occasion in question, do you find from a preponderance of the evidence that a reasonable peace officer could have believed his conduct to be lawful in light of clearly established law and the information possessed by the peace officer at the time the conduct occurred?

Answer "Yes" or "No."

Answer: _____

If you have answered "Yes" to Special Interrogatory No. 1 with respect to the City of Kerrville, then answer Special Interrogatory No. 3 with respect to the City of Kerrville only if you have answered "No" to Special Interrogatory No. 2. Otherwise, do not answer Special Interrogatory No. 3 with respect to the City of Kerrville. If you have answered "No" to Special Interrogatory No. 2, then answer Special Interrogatory No. 3 with respect to Donald H. Bunch. Otherwise, do not answer Special Interrogatory No. 3 with respect to Donald H. Bunch.

Special Interrogatory No. 3

3. What sum of money, if any do you find from a preponderance of the evidence would reasonably compensate the plaintiffs, for their damages resulting from the death of Edward Gonzales? (Note: You may apportion all damages between the two plaintiffs.)

Answer in dollars and cents or zero.

Answer: Paul Gonzales: $50,000.00

Elizabeth Gonzales: 50,000.00

Have the Foreperson sign and date this Special Interrogatory form and give it to the Court security officer.

We, the jury, unanimously answered the preceding question(s) by a preponderance of the evidence.

/s/ [Illegible] Date: 8/24/98
Foreperson of the Jury

APPENDIX C

[Filed Sep. 24, 1998]

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil No. SA-96-CA-998 HG

PAUL GONZALES, SR. and ELIZABETH GONZALES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF EDWARD G. GONZALES, DECEASED,

Plaintiffs,

v.

THE CITY OF KERRVILLE, TEXAS; and DONALD H. BUNCH, IN HIS OFFICIAL CAPACITY,

Defendants.

ORDER

On this day, the Court considered Plaintiffs' Motion to Alter Judgment or, Alternatively, Motion for New Trial and Brief and the response filed by the Defendants. Having reviewed the same, and the authorities cited therein, the Court is of the opinion that the motions should be denied.

I. Motion to Alter Judgment

In *Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d (1986) (*per curiam*), the Supreme Court addressed a similar situation in which after a jury found that a

police officer had not used excessive force when apprehending a suspect, the trial court dismissed the claim against the city because once "the police officer had been exonerated by the jury there could be no basis for the assertion of liability against the city or the persons constituting its Police Commission." *Id.* at 798, 106 S.Ct. at 1572. The Supreme Court agreed with the trial court, holding "this was an action for damages, and neither *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.* at 799, 106 S.Ct. at 1573. The Court added "[if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Id.* Thus, to prevail on a *Monell* claim, a plaintiff must establish (1) that he has suffered a constitutional injury, e.g., he was a victim of excessive force by a police officer, and (2) that the city authorized or maintained a custom of approving of the unconstitutional conduct. *Thompson v. Boggs,* 33 F.3d 847, 859 (7th Cir. 1994).

Here, the jury verdict in favor of Officer Bunch on the question of whether he used excessive force precludes the possibility that the Gonzales family could prevail on their *Monell* claim. *Heller,* 475 U.S. at 799, 106 S.Ct. at 1573; *Thompson,* 33 F.3d at 859; *see also Hahn v. Kenner,* 984 F.Supp. 424, 435 (E.D.La. 1997) ("[a] municipal corporation can not be held liable 'based on the actions of one of

its officers when in fact the jury has concluded that the officer has inflicted no constitutional harm' ") (citing *Heller*); *Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992) ("because [the officer] did not violate [the plaintiff's] constitutional rights, there is no basis for liability against the other defendants either") (citing *Heller*); *Myatt v. City of Chicago*, 816 F.Supp. 1259, 1264 (N.D.Ill. 1992) ("[i]f the individual officers are not held liable, the City cannot be held liable under a *Monell* claim") (citing *Heller*).

However, the Court is aware that some courts have argued that *Heller* is to be given a narrow reading, and should not be extended beyond those instances when the city's liability is based upon its responsibility for the particular officer's allegedly unconstitutional conduct. *Garrison v. City of Texarkana*, 910 F.Supp. 1196, 1204 (E.D. Tex. 1995) (citations omitted). If the constitutional violation resulted from enforcement of municipal policy or custom, then the municipality will be liable for its wrongs. *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985); *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985).

Plaintiffs seek to impose liability on the City of Kerrville for inadequately training its officers and adopting a "wait and shoot" policy. Plaintiffs allege that the City of Kerrville tolerates the use of excessive and unreasonable force to such an extent that it has become the custom of the department. These allegations against the City of Kerrville are separate and distinct from any allegations based upon responsibility for Officer Bunch's actions.

Yet, the Fifth Circuit has held that proof of a single violent incident is ordinarily insufficient to hold a municipality liable for inadequate training. *Snyder v. Trepagnier,* 142 F.3d 791, 798 (5th Cir. 1998). Furthermore, the plaintiffs must demonstrate "at least a pattern of similar incidents in which the citizens were injured . . . to establish the official policy requisite to municipal liability under section 1983." *Id.* at 798 (citing *Rodriguez v. Avita,* 871 F.2d 552, 554-55 (5th Cir. 1989) (internal quotation and citation omitted)). Here, there is no evidence that the City of Kerrville had actual knowledge of a pattern, or series of allegations, of excessive force on the part of its officers, and in particular Officer Bunch. The only other incident similar to the one in question, involving a gunman in a Whataburger restaurant, was resolved peacefully. Therefore, even in the alternative, the Gonzales family can not prevail.

II. Motion for New Trial

The Court agrees with the Defendants that many of the instructions now complained of by the Plaintiffs were contained in the Joint Pretrial Order and the Fifth Circuit Pattern Jury Instructions (Civil), and refuses to grant the motion on that basis.

III. Conclusion

Therefore, for the reasons cited above, the Court hereby ORDERS that Plaintiffs' Motion to Alter Judgment or Alternatively, Motion for New Trial and Brief be DENIED.

Signed this 24th day of September, 1998.

/s/ H. F. Garcia
H. F. GARCIA
United States District Judge